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No. 93-496

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IRVING C. AND JEANETTE STEVENS,

Petitioners,

v.

THE CITY OF CANNON BEACH and STATE OF OREGON, by and through its Department of Parks and Recreation,

Respondents.

Petition for a Writ of Certiorari To the Supreme Court Of the State of Oregon

PETITIONERS' REPLY MEMORANDUM TO RESPONDENTS' BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, the Petitioners, Irving C. and Jeanette Stevens, respectfully submit this Reply Memorandum to Respondents' Brief in Opposition.

REASONS FOR GRANTING THE WRIT

1. This case comes as the inevitable consequence of this Court's recent property rights jurisprudence. The issue raised in this Petition is:

> Whether a state may, by judicial decree, retroactively deprive a class of land-owners the right to exclude the public based upon a common law principle of custom never before applied to such property.

Respondents clearly understand this to be the nub of the case, Op. Cert. 1, 15-16, 19-21, and so should this Court.[1]

[1]Petitioners regard the issue just propounded to be fairly included in the Questions presented, as per Rule 14.1(a) and this Court's decision in Yee v. City of Escondido, 112, S.Ct. 1522, 1532-34 (1992). As noted already, Respondents are manifestly on notice that this is the question in dispute which subsumes each of the arguments made in the Petition. Petitioners will thus be content to argue this issue alone to the Court.

Petitioners' submissions reduce to one unassailable proposition: government cannot take a right in property and justify that taking by asserting that the right never adhered by reason of a custom that had never before been judicially recognized or statutorily codified. The Oregon Supreme Court's decision, from which review is sought here, purports to do just that. Pet. App. A11-A12. The Petitioners hold property, purchased and appropriately-zoned long before the Oregon courts had declared that by reason of custom they could not exclude the public. The decision below results in a permanent public invasion of the property and eradicates viable economic use.

The Supreme Court of Oregon has found a convenient and easy end-run around the barriers to overweening governmental regulation of property erected by this

Court's decisions in such cases as Hughes v. Washington, 389 U.S. 290 (1967); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); and Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). It has been axiomatic in this Court's constitutional treatment of property rights that there can be no denial of due process and no taking by government action unless a land-owner is deprived of an actual right in property. This characterization of rights affected by government action depends, in turn, on the "background principles of nuisance and property law" in a particular jurisdiction. Lucas, 112 S.Ct. at 2901-02. But this Court cautioned in Lucas that a state "must do more than proffer the legislature's declaration that the uses [a landowner] desires are inconsistent with the public

interest, or the conclusory assertion that they violate a common law maxim . . . ." Id. at 2901. A restriction on the use of land, the Court concluded, "cannot be newly decreed or legislated (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership." Id. at 2900.

The Oregon Supreme Court failed to heed this warning when it ruled that Petitioners never had a right to exclude the public from the "dry-sand" beach on their property, Pet. App. A11-A12, and, as a consequence, they were not entitled to permits to improve their property at the expense of public access. This right, the Oregon Supreme Court declared, had been lost. How? By virtue of the Oregon Supreme Court's earlier decision in a case called State ex rel.

Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969), which had announced that a common law principle of custom, derived from English jurisprudence, applied to create a public recreational easement for all of the state's dry-sand beaches situated on private property. When? Despite the decision in Thornton having been announced in 1969, well after Petitioners' vesting of title, the court below nonetheless believed that Thornton "merely enunciated one of Oregon's 'background principles of . . . the law of property'," Pet. App. A12 (citing Lucas, 112 S.Ct. at 2900), and so Petitioners (it seemed) never possessed the right to exclude the public, not even at the outset of their ownership.

By its decision, the Oregon Supreme Court has simply obliterated a constitutional requirement (whether articulated in a takings or due process

idiom)[2] that notice must be given to property owners when the government purports to take significant -- and valuable -- interests in land. The Oregon Supreme Court's reliance on the common law principle of custom to accomplish this end may seem quirky, if not downright anachronistic. Nonetheless, it was chosen with great care in Thornton and confirmed with deliberate precision in this case. The reason lies in the very nature of the customary doctrine.

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[2]Petitioner intends to argue this point under both the Due Process clause of the Fourteenth Amendment and the Just Compensation guarantee of the Fifth Amendment.

Respondents object, however, that the procedural due process ground was not properly raised below. This is not true, as even a cursory examination of Petitioners' filings will reveal. This issue was briefed before the Oregon Court of Appeals, see Pet. App. vol. II, app. G, at 90-92 & n.3, and before the Oregon Supreme Court, see id., App. H., at 155-63. More importantly, the Oregon Supreme Court passed on this issue when it upheld the retroactive effect of the Thornton decision. See Pet. App. A11-12.

As the Oregon Supreme Court itself explained in Thornton, custom was to be preferred to other mechanisms for the acquisition of public rights in private property, such as prescription, dedication, or public trust. Cases brought under such alternative theories, the Thornton court opined ". . . could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region." 254 Or at 595, 462 P.2d at 676.

The danger that this precept poses to this Court's property rights jurisprudence is immense. The power of the customary principle lies in its application to entire classes of property, not just particularized parcels. As Respondents have themselves argued, Op. Cert. 24 n.9, 28, once a jurisdiction recognizes that any kind of right to private property can be acquired

via custom, all land-owners are on notice that the type of property they own may later become the subject of such a claim. If Oregon was the only state which recognized the principle of customary acquisition of private rights, Petitioners would agree that this case would probably be unworthy of review. But many states have recognized such a doctrine,[3] and have applied it to

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[3]Petitioners have already noted for the Court's benefit, Pet. 14 n.4, those states that have used a rule of custom to find a public right in private dry-sand beaches. These include Hawaii, Florida, and Texas. These decisions were clearly influenced by the Oregon Supreme Court's decision in Thornton. See City of Daytona Beach v. Tona-Rama, 294 So.2d 73, 78 (Fla. 1974); County of Hawaii v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61 (1973), cert. denied, 419 U.S. 872 (1974); Matcha v. Mattox, 711 S.W.2d 95, 98-99 (Tex. Civ. App. 1986) (writ ref'd n.r.e.), cert. denied, 481 U.S. 1024 (1987). See also United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769 (D.V.I. 1974), aff'd mem., 529 F.2d 513 (3d Cir. 1975) (relying on Thornton, applied custom doctrine to dry-sand beach in U.S. Virgin Islands).

It is worth pointing out that the South Carolina Supreme Court, in the decision

property other than dry-sand beaches.[4] Jurisdictions are likely to find solace in the doctrine precisely because it affords a way to circumvent due process requirements

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reviewed in Lucas, noted that it could have decided the case on the basis of customary rights, but otherwise expressed no opinion on the subject. 304 S.C. 376, 378 n.1, 404 S.E.2d 895, 896 n.1 (1991).

[4]Six additional jurisdictions have decisions accepting the use of custom in granting rights to private property, other than to dry-sand beaches. See, Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (Haw. 1982) (gathering rights); State ex. rel. Haman v. Fox, 100 Idaho 140, 594 P.2d 1093 (Idaho 1979) (public access to lake-front); Littlefield v. Maxwell, 31 Me. 134 (1850); Freary v. Cooke, 14 Mass. 488 (1779); Perley v. Langley, 7 N.H. 233 (1834) (right of passage); Nudd v. Hobbs, 17 N.H. 524 (1845) (same); Knowles v. Dow, 22 N.H. 387 (1851) (right to collect seaweed); Post v. Munn, 4 N.J.L. 61 (1818) (navigation over private fishing grounds); Morey v. Fitzgerald, 56 Vt. 487, 490 (1884) (right of passage).

Under the logic of the Oregon Supreme Court's decision and Respondents' position, any of these states, or any other state for that matter, could judicially "recognize" a "pre-existing" public interest in private property without any further notice and without any just compensation.

and just compensation guarantees for entire categories of property. In fact, nothing now prevents other states from adopting custom to impose public easements or other use restrictions on all types of property interests.

2. Aside from minimizing the importance of this issue, Respondents make only one other relevant point. They try to suggest that the Oregon Supreme Court's reliance on its Thornton decision (with its enunciation of a customary public right to privately-held dry-sand beach) was unnecessary to its judgment and that the court below dispensed with Petitioners' claims on other (presumably, independent) grounds. Op. Cert. 13, 16. This is simply not true. The Oregon Supreme Court made clear that the Thornton authority and the doctrine of custom was a necessary legal predicate for the state of Oregon to

legislate beach development restrictions.[5] Respondents actually acknowledge this. Op. Cert. 18.

It is also unnecessary for Petitioners' argument here that the governmental impact on property, achieved retroactively by a court's use of the common law doctrine of custom, work a total (or near total) reduction in the value of the property. Petitioners obviously maintain it did. But Respondents' contention that this case is pointless because the Oregon Supreme Court ruled that no such total diminution in worth had occurred here is irrelevant. It really does not matter; the entire point of this litigation is to challenge the retroactive application of a public easement divined

[5]"The state concedes that such legislation [ORS 390.610 et seq Oregon Beach Bill] cannot divest a person of his rights in land, Hughes v. Washington, 389 U.S. 290. . ." Thornton, 254 Or at 591, 462 P.2d at 675.

from custom.[6] The Oregon Supreme Court all but acknowledged that this was the decisive -- indeed, the only -- issue in this controversy.

CONCLUSION

For the foregoing reasons, along with those previously presented, the Petition should be GRANTED.

[6]This was the premise of Petitioners' Amended Complaint. See Op. Cert. App. 3-4 (¶¶ 12, 16, 18), 6-7 (¶¶ 29, 31-33). In dismissing the Complaint with prejudice, the trial court explicitly affirmed the principle of Thornton and ruled that Petitioners had no entitlement to use the property in the manner they intended. See Pet. App. vol. I, app. C, at 24. The dismissal with prejudice obviously precluded making a record as to the actual interpretation and impact of Oregon's and Cannon Beach's regulatory schemes. This will have to be accomplished on remand to the trial court.

Respectfully submitted.

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